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No. 95-2058

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

–v.–

THE UNITED STATES,

Respondent.

BRIEF OF AMICI CURIAE THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

The American Automobile Manufacturers Association (AAMA) is a non-profit national trade organization. Its member companies, Chrysler Corporation, Ford Motor Company and General Motors Corporation, are principally engaged in the production and sale of motor vehicles. The Association of International Automobile Manufacturers (AIAM) is a trade association organized as a non-profit corporation under the laws of the District of

[1] *Amici Curiae* appear with the consent of petitioner and respondent.

Columbia, which represents the American subsidiaries of international automobile companies.[2]

The decision below, *Chrysler Corp. v. United States*, No. 95-1366 (Fed. Cir., Mar. 22, 1996) (*"Chrysler"*), involves the assessment of customs duties on motor vehicles assembled in Mexico and imported into the United States. The motor vehicles incorporate U.S. made components, including fabricated sheet metal components that form the vehicle body. During the assembly process, the U.S. origin sheet metal components were subjected to a painting process typical of that used by most manufacturers in the course of producing finished motor vehicles. When the vehicles were imported into the U.S., Chrysler claimed duty free treatment for these sheet metal components under subheading 9802.00.80 of the Harmonized Tariff Schedules of the United States (HTSUS). Subheading 9802.00.80 exempts from duty the value of U.S. origin fabricated components assembled abroad that are not advanced in value or improved in condition abroad "except by being assembled and except by *operations incidental to the assembly process, such as* cleaning, lubricating or *painting*." 9802.00.80(c), HTSUS (emphasis added). The U.S. Customs Service denied Chrysler's claim on the painted components, and assessed customs duties thereon.

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[2] AIAM's member companies include American Honda Motor Co., American Suzuki Motor Corp., BMW of North America Inc., Fiat Auto U.S.A., Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Land Rover North America, Inc., Mazda Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls-Royce Motors Cars, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and G Volvo North America Corp.

Amici curiae are manufacturers of motor vehicles distributed and sold within the United States, including motor vehicles assembled in foreign countries with the use of U.S. made components. Many of these vehicles are subsequently imported into the United States with claims for duty allowances under subheading 9802.00.80. *Amici curiae* are also the major end users of motor vehicle parts assembled abroad with U.S. made components which are imported under subheading 9802.00.80. As the largest users of subheading 9802.00.80, *amici curiae* have a vital interest in the proper and effective administration of the statute, and the application of the duty allowance to the full extent intended by Congress.

The instant action is the second of two cases before the Federal Circuit to challenge the Customs Service's denial of duty-free entry under subheading 9802.00.80 (and its identical predecessor provision, Item 807, Tariff Schedules of the United States (TSUS)) to U.S. made automobile components that had been painted during an assembly operation abroad. In the first action, *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992) ("*General Motors*"), the trial court ruled that a similar painting process was "incidental to assembly" of the motor vehicles. The Federal Circuit reversed in a 2 to 1 decision. Without expressly finding that the painting operation was not incidental to assembly of the vehicles, the majority held that the painting operation was "not within the scope" of the statute because it was not "of a minor nature." 976 F.2d at 721. Chief Judge Nies strongly dissented on the grounds that the plain language of the statute required a duty allowance because the painting operation was incidental to the assembly process. Chief Judge Nies refused to impose a restriction not found in the statute.

In *Chrysler*, the trial court again found that the painting process at issue was logically performed during the process of assembling the motor vehicle. *Chrysler v.*

United States, 20 CIT ___, Slip Op. 95-39, at 4 n.4 (Ct. Int'l Trade 1995) ("painting must take place after welding [the U.S. origin sheet metal into the vehicle body] . . . [and] cannot be performed at the end of the assembly process . . ."). The trial court clearly believed this painting process was incidental to the assembly of the imported vehicle, stating, "[p]ainting operations that are such an integral part of the assembly process, as the painting processes at issue here, may have been intended by Congress to be found 'incidental to assembly' [and] [t]he plain terms of the statute support such a reading. . ." *Id.* at 7. In spite of these findings, the trial court was compelled to uphold denial of duty free entry under subheading 9802.00.80 because, under the majority opinion in *General Motors*, the painting process was not of a "minor nature." *Id.* at 4, 6. The Federal Circuit panel below affirmed, noting it was bound by *General Motors* until overturned. *Chrysler*, No. 95-1366 at 6.

The impact of these decisions is far reaching. Any cleaning, lubricating, painting or other process, no matter how incidental to assembly of the finished article, will preclude 9802.00.80 eligibility if it is found not to be of a "minor nature." Yet, as noted by the trial court in the instant case, the *General Motors* test—restricting 9802.00.80 eligibility to "minor" operations—is not supported by the plain language of the statute, results in a less administrable statute, and will impede "fulfillment of the Congressional intent to promote use of United States made components abroad." Slip Op. 95-39 at 7. The lower court's decision accordingly will have a substantial adverse impact upon the ability of *amici curiae*—as well as other industries—to take full advantage of the tariff benefits intended by Congress under subheading 9802.00.80.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

The decision below is clearly erroneous and should be reversed. The Court of Appeals disregarded settled precedent of this Court by reading a restriction into the statute that is not found in the plain and unambiguous words employed by Congress. The tariff statutes, including 9802.00.80, affect billions of dollars of U.S. commerce, and were drafted by Congress to accomplish specific policy objectives. The lower courts should not be free to legislate new statutory limitations where Congress has not done so.

Furthermore, the decisions in *Chrysler* and *General Motors* conflict with prior decisions of the Federal Circuit and the Court of Customs and Patent Appeals involving the same tariff statute. Prior decisions applied the statute by examining the relationship of the non-assembly operation at issue to the nature of the entire assembly process, to determine if it was "incidental" thereto. No prior court ever restricted the scope of 9802.00.80(c) HTSUS, or 807.00 (c), TSUS, to "minor" non-assembly operations. There are currently cases pending in the trial court that may be affected by a decision herein, and further litigation can be expected absent a definitive ruling by this Court.

Finally, certiorari is warranted due to the importance of the issues to the administration of a tariff provision affecting over $16.9 billion in U.S. exports and $56 billion in imports. Congress enacted the statutory language at issue so as to encourage the use of U.S. made components in the foreign assembly of goods intended for the U.S. market, thereby stimulating U.S. manufacturing and employment. The Federal Circuit's ruling undermines these objectives. The ruling below also impedes uniform and predictable application of the statute and runs contrary to long term Congressional trends to reduce tariffs and trade barriers.

REASONS FOR GRANTING CERTIORARI

I.

The Decision Below Conflicts With Rules Of Statutory Construction

The Federal Circuit's decisions in *Chrysler* and *General Motors* conflict with well-settled decisions of this Court on statutory construction, and thereby frustrate the intent of Congress. Certiorari is warranted to remedy this error. *See United States v. Oregon*, 366 U.S. 643, 645 (1961) ("Because of the importance of this question of federal statutory construction . . . we granted certiorari."). If a statute is clear and unambiguous, the courts must give effect to the intent of Congress as expressed in the statutory language. *See Brown v. Gardner*, 115 S. Ct. 552, 556 (1994). Consequently, where statutory provisions "are clear and unequivocal on their face, [there is] no need to resort to the legislative history of the Act" to find a different meaning. *Oregon, supra*, 366 U.S. at 648. Moreover, seemingly clear statements of intent in the legislative history "have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute." *Id.; see also United States v. Turkette*, 452 U.S. 576, 580 (1981) (unambiguous statutory language is ordinarily "conclusive" absent "'a clearly expressed legislative intent to the contrary'.").

Subheading 9802.00.80 states that articles assembled abroad with U.S. components will receive a duty allowance upon their return to the U.S. if certain conditions are satisfied. Subsection (c) permits the duty allowance for those U.S. components sent abroad which have not been advanced in value or improved in condition except by assembly or "by operations incidental to the assembly process such as cleaning, lubricating and painting." 9802.00.80(c), HTSUS. The trial court below and the

dissent in *General Motors* found this language to be clear and unambiguous. *Chrysler*, Slip Op. 95-39 at 7; *General Motors*, 976 F.2d at 721. Neither the majority in *General Motors* nor the panel in *Chrysler* stated that subsection (c) was ambiguous. Nonetheless, the appellate court focused on a single statement in a House Committee report—that "such operations, if of a minor nature incidental to the assembly process, ... would be permitted"[3]—and reasoned that the statute thus required non-assembly operations to be both "incidental to assembly" and "minor" in nature. 976 F.2d at 720 (operations must be "minor and incidental to assembly").

"Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown, supra*, 115 S.Ct. at 555. Here, the statutory context of the phrase "incidental to assembly" creates no ambiguity, and the Federal Circuit did not so find. In plain and certain terms, the statute says that if a non-assembly operation is incidental to assembly of the article, it is permissible; operations that are not incidental to assembly are precluded. There is no cause to search beyond this statutory language for additional criteria, and it was clear error for the Court of Appeals to do so. Moreover, Congress specifically enumerated "painting" as an example of an operation incidental to assembly. This express statutory reference to "painting" is a clear indication that Congress intended to allow painting—such as that at issue—performed as an integral process during assembly; far clearer an indication of Congress' intent than the term "minor" found in a single committee report. *See, e.g., Turkette, supra*, 452 U.S. at 580 (the intent of Congress must be determined first from the language of the statute).[4]

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3 H.R. Rep. No. 342, 89th Cong., 1st Sess. 48, 49.

4 The legislative history also supports the plain language construction advocated by the *General Motors* dissent. 976 F.2d at

The judiciary's prerogative to legislate a limitation on the plain language of a tariff provision has been rejected by this Court. In *Asiatic Petroleum Co., Ltd. v. Insular Collector of Customs*, 297 U.S. 666 (1936), a case decided under the Philippine Tariff Act of 1909, the lower court held that § 21 of the Act, providing for a refund ("drawback") of import duties on fuel subsequently used in "vessels engaged in trade with foreign countries," was limited to vessels of Philippine or American registry. 297 U.S. at 652. In reversing, this Court stated:

> The court below limited the scope of the drawback provision by inserting, in effect, after the word "vessels," as it appears in § 21, the words "of Philippine or American registry." The statute is plain upon its face. * * * **We are not at liberty to limit the application of so clear and unambiguous a statutory direction in the absence of convincing evidence that the intent of Congress was less sweeping than its words import.** We hold that the section applies to fuel sold to all vessels, of whatever registry, trading with foreign countries.

297 U.S. at 671-672 (emphasis added). The decision below directly conflicts with this (and other) Supreme Court authority by imposing a restriction that was not included in the statute.

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722 ("807.00's legislative history explicitly names incidental painting as an operation which does not negate a duty allowance of imported components"). Thus, the legislative history is at best "ambiguous." *See Chrysler*, Slip Op. 95-39 at 7 n. 10. The statute, however, is not, and it is error to create an ambiguity in an otherwise clear statute by reference to legislative history.

In a similar vein, this Court in *Turkette, supra,* reversed a court of appeals decision which limited the term "enterprise" in 18 U.S.C. § 1962(d) to mean only legitimate enterprises, to the exclusion of criminal associations. Significantly, this Court stated that "[h]ad Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate'." 452 U.S. at 581. The same reasoning applies to the decision below. Had Congress intended to limit incidental operations to those which are also "minor," it could easily have inserted the word "minor" prior to the word "incidental." In fact, where Congress intended to restrict a tariff provision to articles subjected to only "minor" processes or operations, it has used express words to that effect. *See, e.g.,* Chapter 96, Note 3, HTSUS ("'prepared knots and tufts for broom or brush making' applies only to . . . material, which [is] ready for incorporation . . ., or which require[s] only such further ***minor*** processes as trimming to shape at the top, . . ."). As stated by this Court in *Turkette,* "[t]he Court of Appeals . . . clearly departed from and [improperly] limited the statutory language." *Id.* The trial court in *General Motors* was therefore correct when it stated, "the Court is not inclined to infer words of limitation where Congress has so specifically omitted them . . ." 770 F.Supp. 641, 647 (Ct. Int'l Trade 1991), *revs'd,* 976 F.2d 716 (Fed. Cir. 1992).

The decision below raises an issue of statutory construction with implications well beyond the parties and controversy at bar. Subheading 9802.00.80 is but one of many special trade programs permitting an exemption from customs duties. Congress has carefully tailored these programs to meet specific legislative objectives, such as stimulating domestic manufacturing and employment by promoting exports of manufactured components, while balancing the needs of U.S. trade policy. It is clear that Congress acted deliberately when drafting the statutory language establishing the criteria for eligibility under

these programs. The Court of Appeals, however, apparently believes itself free to legislate additional criteria, even though Congress did not do so. Certiorari is warranted to remedy this error and insure meaningful judicial review of the tariff statutes, in accordance with the principles of statutory construction laid down by this Court.

II.

The Decision Below Conflicts With Prior Lower Court Precedent Interpreting The Same Tariff Provision

The plain language of the statute is controlling, and the Court of Appeals erred by failing to apply it. The decision below, however, also merits review by the Supreme Court because the lower court's current construction of subheading 9802.00.80 conflicts with prior decisions of the lower courts applying the same statutory language.

Prior to *Chrysler* and *General Motors*, the lower courts determined whether an operation was "incidental to assembly" under item 807.00(c), by comparing the relationship of the operation in issue to the entire manufacturing or assembly process of the final product. *See, e.g., General Instrument Corp. v. United States*, 480 F.2d 1402, 1406 (CCPA 1973) ("classification under item 807.00 depends upon the relationship of the disputed element to the whole"); *Rudolph Miles v. United States*, 567 F.2d 979 (CCPA 1978); *Mast Industries, Inc. v. United States*, 668 F.2d 501, 506 (CCPA 1981) ("*Mast*"); *L'Eggs Products v. United States*, 704 F.Supp. 1127, 1132 (Ct. Int'l Trade 1989); *Zwicker Knitting Mills v. United States*, 469 F.Supp. 727, 737 (Cust. Ct. 1979), *aff'd*, 613 F.2d 295 (CCPA 1980); *See also Samsonite Corp. v. United States*, 889 F.2d 1074, 1077

(Fed. Cir. 1989) ("The critical inquiry . . . is not the amount of processing that occurred . . ., but its nature.").[5]

Most importantly, in *Mast*, the court clearly indicated that the statutory test under subsection (c) is whether the disputed operation is "incidental" in terms of its relationship to the whole assembly process. The court set forth four factors relevant to that determination. A cost comparison to determine whether the operation was "minor" was only one of the four factors. *Mast*, 668 F.2d at 506. "The remaining three factors in *Mast* focus on the relationship between the operation and the assembly process in order to determine to what extent the assembly process dictated that the operation be performed abroad with the assembly." *General Motors*, 976 F.2d at 722 (Nies, C.J., dissenting). *See also Rudolph Miles, supra*, 567 F.2d at 983 (burning holes in steel beams, "measures that at first blush might seem to produce dramatic changes," were incidental to assembly of railroad cars because the techniques employed were appropriate "in perspective" to the article being assembled and the assembly process). This interpretation is consistent with the common and ordinary meaning of "incidental."[6]

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5 *Samsonite* concerned the related question of whether the processing abroad constituted "further fabrication" of the U.S. components. *See* Item 807(a), TSUS, and subheading 9802.00.80 (a), HTSUS (requiring that the components "were exported in condition ready for assembly without further fabrication").

6 *Black's Law Dictionary* (1979) ed.) ("depending upon or appertaining to something else as primary; . . . something incidental to the main purpose"); *Webster's Third New Int'l. Dictionary* (1966 ed.) ("attendant in position or significance; subordinate, nonessential"); *Oxford English Dictionary* (1987) ("Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part"). *See also Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 261

Prior decisions also provide strong authority with respect to painting (coating) operations such as those involved here. For example, in *Mast*, the court stated, "...[i]ndeed, the statute sets forth 'painting' of a component as an example of permissible operations incidental to assembly ... It is difficult to visualize a situation where the sole purpose of painting would be to facilitate assembly, or even where painting would be essential to the assembly process." 668 F.2d at 505. Similarly, in *General Instrument Corporation v. United States*, 462 F.2d 1156 (CCPA 1972), the court held that coating assembled components with a dark colored epoxy was an acceptable 807.00 process. In *General Instrument Corporation v. United States*, 71 Cust. Ct. 51, C.D. 4470 (1973), the court held that encapsulating U.S. fabricated components in plastic after assembly abroad was also an acceptable process under the statute. Application of the foregoing standards to Chrysler's assembly process should have resulted in a decision holding that the painting operation was appropriate to the size and nature of the article being assembled, was clearly performed in connection with and subsidiary to the assembly process, and thus was incidental to assembly.

General Motors and *Chrysler*, however, deviated markedly from this precedent by disallowing the duty benefit because it found that the painting operation was not "minor in nature." The Court of Appeals relied almost exclusively upon a comparison of costs associated with the disputed operation *(e.g.*, capital investment in the painting operation), to costs associated with the disputed U.S. components *(e.g.*, capital investment in the body shop, where the disputed components were welded

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(1955) (in determining whether transporting sugarcane from the fields to the mill via railroad is "incident to" farming, ***"we must look to the function performed"*** in relation to farming, rather than the unusual (and presumably capital intensive) transport method employed.) (emphasis added).

together). *General Motors*, 976 F.2d at 720-721; *Chrysler*, No. 95-1366 at 5. The question of whether the operation was incidental to the assembly process under previously established criteria was ignored. The incorporation of "painting" in the statute creates a presumption that such operations are acceptable. The appellate court had no authority to disregard this clear expression of Congressional intent.

The trial judge below criticized this approach, and while the Federal Circuit panel in *Chrysler* stopped short of doing the same, one can discern its lack of enthusiasm for the *General Motors* decision. As emphasized by the dissent in *General Motors*, the majority's approach runs afoul of prior precedent, including *Mast*, which found other operations to be incidental to assembly based on the nature of the assembly process and its relationship to the processing at issue. 976 F.2d at 723 ("The nature of the assembly process dictated that the painting operations be performed concurrently with the assembly of the car and, therefore, the painting operations conducted in Mexico were 'incidental to the assembly process'.") (Nies, C.J., dissenting).[7]

The tariff provision at issue, now embodied in subheading 9802.00.80, HTSUS, has been in existence since 1963, and will in all likelihood remain as part of any successive tariff schedules. Presently, over a dozen other importers, aside from Chrysler, have cases pending in the Court of International Trade contesting the denial of duty free entry for U.S. components under subheading 9802.00.80. *See, e.g., Haggar Apparel Company v. United*

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[7] The *General Motors* majority purports to follow *Mast* in holding that painting which is not "minor in nature" is "beyond the scope" of item 807(c). Yet the only Circuit judge among them involved in *Mast*, Judge Nies, concluded that the majority's reasoning conflicted with *Mast*.

States, Slip Op. 96-110 (Ct. Int'l Trade, July 12, 1996). The issue presented is recurring, unsettled, and in need of resolution by this Court. *See, e.g., Thor Power Tool Co. v. Commissioner of Internal Revenue*, 439 U.S. 522, 525 (1979) ("We granted certiorari . . . to consider these important and recurring income tax accounting issues").

III.

This Case Presents Issues Of Substantial Importance Under The Tariff Laws

This Court has previously recognized the propriety of certiorari where, as here, a case presents an important issue arising under the tariff and revenue laws. *See, e.g., Barr v. United States*, 324 U.S. 83, 85 (1945) ("This case [construing § 522(c) of the Tariff Act of 1930] is here on a petition for a writ of certiorari which we granted because of the importance of the questions presented"); *West India Oil Co. v. Domenech*, 311 U.S. 20, 24 (1940) ("We granted certiorari . . . because the question presented is of importance in the administration of the customs laws of the United States . . ."); *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 375 (1940) ("We granted certiorari because of the importance . . . to the administration of the flexible tariff provisions of the Tariff Act of 1930); *Asiatic Petroleum Co. v. Insular Collector of Customs, supra*, 297 U.S. at 667 (1936) ("The reasons assigned [for certiorari] are the importance of the question . . ."); *United States v. Aetna Explosives Co.*, 256 U.S. 402 (1921); *see also Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 553 (1993) ("In order to resolve an issue of substantial importance under the Internal Revenue Code and to settle a perceived conflict, we granted certiorari"); *Ivan Allen Co. v. United States*, 422 U.S. 617, 624 (1975) (". . . and because of the importance of the issue in the administration of the accumulated earnings tax, we granted certiorari").

A. Subheading 9802.00.80 Has A Major Impact On International Trade

Subheading 9802.00.80, HTSUS, serves vital interests of U.S. manufacturers, exporters, importers and workers. Since its inception in 1963, it has been used successfully to improve price competitiveness or increase profitability of goods sold in the U.S. market by using U.S. origin components, reduce the cost of cross-border transfers of both in-process materials and final goods, rationalize production between domestic and foreign plants, and penetrate foreign markets through U.S. exports. *See Production Sharing: Use of U.S. Components and Materials in Foreign Assembly Operations, 1990-1993*, USITC Pub. 2886 (May 1995) at I-1. In 1993, the most recent year for which such figures are available, $16.9 billion in U.S. fabricated components exported for assembly abroad were entered under HTSUS subheading 9802.00.80. This represents a staggering increase of three-thousand eight-hundred and ten percent (3,810%) over the $433.7 million in U.S. components entered in 1970.

A major beneficiary of the trade program has been the labor employed in the U.S. manufacturing of the $16.9 billion in components which were assembled abroad, and then entered under the tariff program—components which otherwise might have been foreign made had there been no duty incentive to using U.S.-made goods. In this regard, in 1993, companies incorporating U.S. made components into foreign assembled goods saved over one billion dollars in customs duties under 9802.00.80. *Id.* at 1-13. Thus, the U.S. International Trade Commission, an independent body established by Congress to assist it in drafting and administering tariff and trade legislation, stated recently that "production sharing [under 9802.00.80] remains an important part of the global competitiveness strategy for many U.S. firms . . ." *Id.* at ix.

Over $56.4 billion in goods, which represents nearly ten percent of all imports, entered the U.S. in 1993 with claims for duty allowances on U.S.-made components under 9802.00.80. USITC Pub. 2886 at 1-14. Motor vehicles accounted for 45% of this amount. *Id.* Other major users of 9802.00.80 include the apparel, consumer electronic, semiconductor, machinery, and motor vehicle parts industries. It is clear that the statute at issue in this case is of great significance to U.S. trade policy, and to U.S. industry and labor. Due to such importance, certiorari is warranted.

B. Congress Added The Statutory Language At Issue To Liberalize Duty-Free Eligibility of U.S. Made Components

The monumental growth in the value of U.S. fabricated components imported under 9802.00.80 underscores Congressional intent to promote U.S. exports by liberalizing the duty benefit conferred through the use of U.S. made components. Prior to the current law, paragraph 1615(a) of the Tariff Act of 1930 authorized duty free entry of U.S. goods exported and returned without having been advanced in value or improved in condition abroad by any process of manufacturing or other means. Beginning in 1954, Customs followed a judicially approved practice of allowing U.S. components assembled into foreign articles abroad to be entered duty free under this provision on a theory of "constructive segregation." *Tariff Classification Study*, Schedule 8, Part 1, Explanatory Notes 14 (U.S. Tariff Comm'n 1960). When the Tariff Schedules of the United States (TSUS) were enacted in 1963, item 807.00 thereof continued the substance of the prior practice by allowing for duty free entry of U.S. components assembled abroad if not "advanced in value or improved in condition by any means other than the act of assembly." Item 807.00, TSUS (1963). Item 807 however, "limit[ed] the extent of the advancement or improvement to that which is brought

about solely by the act of assembly." *Tariff Classification Study, supra,* at 15.

This provision was found too restrictive and difficult to administer. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965). Consequently, in 1965 Congress amended item 807.00 by adding the language at issue in this case, "specifically to permit" U.S. components to be advanced in value or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." *Id.* at 49. In passing on this amendment, the Senate Committee on Finance stated, "[t]his bill (1) clarifies the type of articles which may be exported for assembly and then reimported; and (2) enlarges the class of activities which may be performed abroad without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong., 1st Sess. 34 (1965). The 3,810 percent increase in the value of U.S. components imported under 9802.00.80 demonstrates that Congress' enlargement of permissible non-assembly activities under subsection (c) has had its desired effect of promoting the use of U.S. made components in foreign assembled goods.

Finally, the Federal Circuit's application of 9802.00.80 conflicts with the trend in Congressional policy toward the reduction in import duties and trade barriers. Since enactment of TSUS item 807.00 in 1963, Congress has reduced duty rates on goods from its principal trading partners on three separate occasions; the "Kennedy Round" reductions in 1967, the "Tokyo Round" reductions in 1979, and the "Uruguay Round" reductions in 1995. *See History of the Tariff Schedules of the United States,* USITC Pub. 1192 (1981); Pres. Proc. 6763, 60 Fed. Reg. 1007 (Jan. 4, 1995). The decision below attributes to Congress an intent to restrict access to free trade at a time when Congress is doing just the opposite.

C. The Decision Below Undermines The Statutory Purpose

The Federal Circuit's decisions in *Chrysler* and *General Motors* serve to defeat the legislative purpose embodied in subsection (c). As the trial court below noted, a test based upon whether an operation is an integral part of the assembly process, rather than whether an operation is "minor" under extensive costs analyses, would result in "a more administrable statute and fulfillment of the Congressional intent to promote use of United States made components in assembly abroad." Slip Op. 95-39 at 7.

Chrysler frustrates the intent of Congress by creating a disincentive for manufacturers to incorporate technological improvements into their foreign assembly operations. No one could genuinely dispute that Congress intended to allow U.S. fabricated sheet metal components to be painted as an incident to being assembled abroad into a motor vehicle. If Chrysler had hand-painted the vehicle body (which must be done after spot welding but prior to assembly with further components), then one could hardly question entitlement to the duty allowance. Yet, Chrysler, presumably to modernize and increase efficiency, made a capital investment in its painting process. Modernization does not change the incidental nature of the operation. *See, e.g., Maneja, supra,* 349 U.S. at 261 ("Certainly no one would argue that the agriculture exemption [covering operations "incident to" farming "such as delivery to . . . market"] did not apply to farm laborers who took the cane to the plant in wheelbarrows [and thus] [t]here is no reason to construe the FLSA so as to discourage modernization in performing this same function [when performed with an extensive railroad network]"); *United States v. Consolidated Int'l Equipment & Supply,* 442 F.2d 376 (CCPA 1971) (tariff provisions are presumed to cover "technological advancements").

It is clear that Congress did not intend to deny an incentive to use U.S. made components solely because the nature of the article being assembled dictated the use of a capital intensive painting process which, perhaps when compared only to the welding process in the body shop (as was done in *General Motors* and *Chrysler*), may appear substantial. When one considers the process required to assemble a motor vehicle, the painting operations at issue were no more substantial than necessary to accomplish a task—painting—which Congress undeniably intended to allow in the course of foreign assembly. It cannot be emphasized enough that the full cost of the painting operation performed abroad, as well as any other process incidental to the foreign assembly, remains fully dutiable under subheading 9802.00.80.

D. The Decision Below Impedes Uniform and Predictable Application of the Statute

Chrysler and *General Motors* give little if any guidance as to what constitutes an operation incidental to assembly. The Federal Circuit found two cost comparisons to be dispositive of whether a non-assembly operation is within the scope of subheading 9802.00.80; (1) a comparison of the cost of the disputed operation to the cost of the affected U.S. components, and (2) a comparison of the investment in disputed operations to the investment in the operations directly relating to assembly of the affected U.S. components. *Chrysler*, No. 95-1366 at 3. This analysis creates obvious difficulties in application. The court below focused primarily on a comparison of fixed assets (the paint shop and the body shop). This comparison will vary widely from one plant to another, and from one industry to another. It therefore fails to provide a reliable and workable framework for determining the only relevant issue; whether the operation was performed incidental to assembly of the imported article. Furthermore, the Federal Circuit's approach places firms or

industries with heavy capital investment in incidental operations at a significant disadvantage under the tariff statute. In essence, the courts and Customs are dictating to industry what types of processes will be incidental to assembly. There is certainly no indication in the statute or its legislative history that Congress intended such a result. Finally, U.S. importers are now being put to an onerous burden of providing the Customs Service with extensive cost accounting information in order to justify the claimed duty allowance. Yet if Congress had intended a cost or value test under the statute—as the Federal Circuit has created—it could have easily drafted one, as it has done for numerous other trade programs. *See, e.g.*, HTSUS General Note 3(a)(iv) (products of insular possessions must not contain more than 70% foreign materials by value). In sum, the decision below impedes uniform and predictable application of subheading 9802.00.80, thus warranting review by this Court.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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